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Dec 15, 2017

APSC

December 14, 2017

Walter L. Thomas, Jr., Secretary
Alabama Public Service Commission
P.O. Box 304260
Montgomery, Alabama 36130

Re: Docket No. 32694, Generic Proceeding to Determine the Commission's Jurisdiction Over
Electric Vehicle Charging Stations

Dear Secretary Thomas:

Attached please find the Alabama Office of the Attorney General's Comments in the above-referenced proceeding. Please be advised that these comments have also been electronically filed with the Commission.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kayla Currie".

Kayla Currie (CUR040)
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**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION
MONTGOMERY, ALABAMA**

IN RE: Generic Proceeding to Determine the)	DOCKET NO. 32694
Commission's Jurisdiction Over Electric)	
Vehicle Charging Stations)	
)	

**COMMENTS OF THE
ALABAMA OFFICE OF THE ATTORNEY GENERAL**

I. Introduction

The Alabama Public Service Commission ("PSC" or "the Commission") issued an order on October 30, 2017 seeking comments from all interested parties regarding the Commission's regulatory jurisdiction over electric vehicle charging stations ("EVCS"). Specifically, the Commission seeks comments on whether entities that own and/or operate EVCS could be subject to the requirements of Title 37 of the Alabama Code, which applies to utilities. According to the Commission, its jurisdiction over electric utilities is grounded in the definition of a utility, as found in Section 37-4-1 of the Alabama Code. The plain language Section 37-4-1(7)(a) states that the term utility includes every person not engaged solely in interstate operations that owns, operates, leases or controls:

Any plant, property, or facility for the generation, transmission or distribution, sale or furnishing to or for the public of electricity for light, heat, or power, or other uses, including any conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission electricity for light, heat, or power, or other uses.

Ala. Code § 37-4-1(7)(a) (2017). It should be noted that this definition of the term utility is identical to the definition provided in the Alabama Code of 1923.

The Commission determined that EVCS would have to meet all three of the following tests to be considered a utility subject to the jurisdiction of the Commission:

1. First, an EVCS must be a '*plant, property or facility*' for the '*generation, transmission or distribution, sale or furnishing . . . of electricity*';
2. Second, an EVCS must be a '*plant, property or facility*' that provides electricity '*for light, heat, or power, or other uses*'; and
3. Third, an EVCS must be a '*plant, property or facility*' engaged in providing electricity in the manner set forth in the above paragraphs '*to or for the public*' in order to be subject to the jurisdiction of the Commission.

Generic Proceeding to Determine the Commission's Jurisdiction Over Electric Vehicle Charging Stations, Docket No. 32694, at 4-5 (Oct. 30, 2017). Along with assessing whether EVCS fall within the definition of utility, the Commission seeks comments regarding the jurisdictional implications associated with three EVCS deployment scenarios that are prevalent in the market today. These three scenarios include: (1) an employer installs EVCS on the employer's premise that is not available to the general public, but open to employees; (2) an owner/operator of a public parking garage installs EVCS facilities that provide vehicle charging service as an incidental service at no extra cost and charges a time-based rate or fee associated with the parking; and (3) a large third-party retail chain installs EVCS facilities on its premises and charges a rate based on "cents per KWh" for the use of the charging facility by the public. *Id.* at 5.

The Office of the Attorney General commends the Commission on its initiative to foster the developing market for public EVCS. As the Commission notes in its order, ownership of plug-in electric vehicles (PEVs) has increased in recent years and caused a growing need for widely distributed and publicly accessible EVCS. Pursuant to the Commission's order, the Attorney General provides the following comments and direct responses to the questions presented by the Commission. The Attorney General again thanks the Commission for its initiative regarding this

developing market and looks forward to working with all interested parties to facilitate the development of publicly available EVCS.

II. Technical and Legal Background on the EVSC Market

It is beneficial to understand what EVCS facilities are and how other states have treated EVCS. EVCS is made up of the equipment, including hardware and software, which is necessary to charge an electric vehicle. Generally, the specialized equipment at public EVCS allows drivers to connect their electric vehicle batteries to chargers that use electricity to recharge the batteries. These chargers only convert electricity into useable transportation fuel for electric vehicles and provide no other electric services. Customers of EVCS are typically billed a bundled rate/fee, which includes fees for use of equipment, the technology offered through the electric vehicle charger (including hardware and software), the real estate upon which the facility is located, maintenance service on the equipment, and the cost of the electric commodity. Although the customer is using electricity, that electricity is incidental to the transaction and the equipment is not designed to provide traditional electric utility services. In fact, most EVCS act as customers of utilities and are subject to the terms of service, rates, and other policies adopted by state commissions.

In considering the question of EVCS regulation, state commissions across the country have held that such services do not constitute the resale of electricity. Several state commissions have concluded that electric vehicle charging equipment provides transportation fuel to mobile customers who may be from another service territory, another state, or even another country. According to a report from the Natural Resource Defense Council (NRDC), sixteen states have adopted policies to make it clear that EVCS are not subject to utility regulations. *See Baumhefner, Hwang, & Bull, Driving Out Pollution: How Utilities Can Accelerate the Market for Electric*

Vehicles, NRDC (June, 2016), <https://www.nrdc.org/sites/default/files/driving-out-pollution-report.pdf>. Below are the views that a few states have taken on the matter:

a) The Massachusetts Department of Public Utilities stated:

We find that an [EVCS] owner or operator is not selling electricity within the meaning of Chapter 164. Rather, the [EVCS] owner or operator is selling EV charging services, i.e., the use of specialized equipment - - EVSE - - for the purpose of charging an EV battery. [EVCS] allows the customer to do only one thing, charge an EV battery. This result is true regardless of the business model the [EVCS] owner/operator uses to charge customers for charging services, even if the charge is by a per-kilowatt hour basis or other volumetric energy basis.

Investigation by the Department of Public Utilities upon its own Motion into Electric Vehicles and Electric Vehicle Charging, D.P.U. 13-182-A (Aug. 4, 2014) at 8.

b) In maintaining a previous order regarding EVCS, the Hawaii's Public Utility Commission stated:

The commission, likewise, approves as just and reasonable the HECO Companies' request to amend their existing Tarif Rule 15.B to clarify that the tariff rule which prohibits an electric utility customer from reselling electric energy to another person, does not apply to the resale of such energy for use solely as a motor fuel for light duty plug-in electric vehicles.

In the Matter of the Application of Hawaiian Electric Co. Inc., 2013 Haw. PUC LEXIS 279, *49.

c) The New York Public Service Commission asserted:

Charging Stations do not fall within the definition of 'electric plant' because Charging Stations are not for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light heat or power. Instead, and as urged by several commenters, Charging Stations are used to provide a service, specifically, charging services.

In the matter of Electric Vehicle Policies, N.Y.P.S.C. 13-E-1099, at 4 (November 14, 2013).

- d) Missouri's Public Utility Commission recently ordered a tariff be revised to clarify that EVCS are not included in the definition of resale as follows:

KCPL shall file an amended tariff to revise the existing prohibition on the resale of electricity in order to clarify that EV charging stations are not reselling electricity.

Re Kansas City Power & Light Company, File No. ER-2016-0285 Tariff Nos. YE-2017-004 and YE-2017-0005, 337 PUR4th 1 at 25 (effective May 13, 2017).

One analogy that has been used in the field is the comparison of EVCS to laundromats. According to this analogy, in both EVCS and laundromats, the marginal cost to the seller is primarily electricity and both involve a significant capital investment. The Arcadia Center and Conservation Law Foundation further explained the analogy in their comments to the New Hampshire Public Utilities Commission:

In both cases, a consumer can choose which laundromat or [EVCS] to visit and will have the opportunity to install comparable equipment in their residence. In both cases, the energy can only be used for one particular purpose, not the multi-purpose use of electricity used in homes and businesses. These factors can all easily distinguish [EVCS] from any policies regarding resale and submetering. In addition, a determination that [EVCS] owners and operators are selling electricity would only cover [EVCS] related commercial transactions and not [EVCS] where vehicle owners charge for free.

Arcadia Center and Conservation Law Foundation Joint Comments Before The State of New Hampshire Public Utilities Commission, Docket No. IR 15-510 (Entered on Jan. 22, 2016) at 2.

This laundromat analogy was recently adopted by the Missouri Public Utility Commission. In issuing an order on a rate case, the Missouri Commission stated,

By analogy, a laundromat uses electricity to provide clothes drying services, but that does not mean that the laundromat's dryers are electric plant[s] or that the laundromat should be regulated by the Commission. EV charging stations are not 'electric plant[s]' and, therefore, the Commission lacks statutory authority to regulate their operation.

To rule otherwise would conceivably assert jurisdiction over other similar battery-charging services. Some examples would be smart phone charging stations or kiosks, RV parks that allow vehicles to connect to the park's electric supply, or

airports that connect planes to a hangar's electricity supply while parked, which the Missouri General Assembly could not have intended.

Re Kansas City Power & Light Company, File No. ER-2016-0285 Tariff Nos. YE-2017-004 and YE-2017-0005, 337 PUR4th 1 at 25 (effective May 13, 2017).

The Attorney General finds the laundromat analogy persuasive and believes the distinction between electricity as a fuel service and electricity as an essential public utility service may place EVCS outside of the Commission's jurisdiction. Utilities that have provided the essential utility services to consumers will now be providing EVCS with electricity that will be converted into transportation fuel for an expanding electric vehicle market.

III. Comments

With the background provided above, the Attorney General directly responds to specific questions posed in the Commission's order.

- a. Is an EVCS a "plant, property or facility" utilized for the "generation, transmission or distribution, sale or furnishing . . . of electricity" pursuant to Alabama law?

Under Alabama law, an EVCS is not a "plant, property or facility" utilized for the "generation, transmission or distribution, sale or furnishing of electricity." This language derives from Title 37 of the Alabama Code, which defines the term "utility" to include:

every person, not engaged solely in interstate operations that owns, operates, leases or controls . . . [a]ny plant, property, or facility for the *generation, transmission or distribution, sale or furnishing* to or for the public of electricity for light, heat, or power, or other uses, including any conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission electricity for light, heat, or power, or other uses

Ala. Code § 37-4-1(7)(a) (2017) (*emphasis added*). Since the enactment of the statute, the Commission and courts restricted the scope of Ala. Code § 37-4-1(7)(a) to full-service electricity providers who generate, transmit, and distribute electricity for the "public interest." EVCS

facilities do not fall within this narrow scope as EVCS use electricity from utilities to provide a limited service to a select group of people, electric vehicle owners.

A finding that EVCS facilities are electric suppliers, and as a result utilities, would hinder the expansion of the electric vehicle market and open the floodgates of regulation to other markets in which the use of electricity is incidental to all transactions. For EVCS specifically, such a finding would invoke the territorial service restrictions of Title 37 that give Legislative franchise holders the exclusive right to provide electric services in assigned areas. *See* Ala. Code § 37-14-30, *et seq.* As a result, prospective EVCS owners/operators would likely halt development for fear that they might violate territorial service restrictions and be shutdown. As for other markets that incidentally use electricity in transactions with consumers, a finding that EVCS facilities are utilities could pull them into the scope of the term as defined in Section 37-4-1(7)(a) and subject them to the jurisdiction of the Commission. Such a result would place a significant burden on the Commission to regulate new markets and hinder economic development throughout the state.

- b. If it is determined that EVCS are facilities utilized for the provision of electricity as discussed in question 1 above, what constitutes the provision of electricity “to or for the public” under the existing law? Moreover, are there any known or envisioned scenarios where EVCS may offer electricity without such offering being classified as “to or for the public.” If so, please describe and explain such scenarios.

As mentioned above, EVCS does not constitute a “plant, property or facility” utilized for the “generation, transmission or distribution, sale or furnishing . . . of electricity” within the Ala. Code § 37-4-1(7)) (a) definition of a utility. Even if EVCS was found to be such “a plant, property or facility,” its charging services are not offered “to or for the public” as that phrase is used in Ala. Code § 37-4-1(7)) (a). The following analysis of Alabama Supreme Court precedent provides support for this assertion that EVCS services are not offered “to or for the public” as that phrase has been used to identify utilities.

The phrase “to or for the public” contained in Ala. Code § 37-4-1(7)) (a) was interpreted by the Supreme Court of Alabama in *Alabama Power Co. v. Cullman County Electric Membership Corp.*, 174 So. 866 (1937). In that case, the Court was tasked with deciding whether the Cullman County Electric Membership Corp. was a “public utility,” as defined in the Alabama Code. *Id.* The Court held that just because the statute creating the Cullman County Electric Membership Corp. authorized it to act as a utility in specific terms did not mean it was subject to the law governing public utilities. *See Cullman County Electric Membership Corp.*, 174 So. At 870. According to the Court, “[a] corporation organized under general laws applicable to all corporations may set out a purpose and have the power to engage in the utility business, but not be a utility until it engaged in such service or holds itself out to do so.” *Id.*

Additionally, the Supreme Court of Alabama commented on the nature of a public utility in *Southern Liquid Gas Co. v. City of Dothan*, 44 So. 2d 744 (Ala. 1950). In that case, a gas company (Southern Liquid Gas) sought to recover business license fees that the city placed on it as a utility. *Id.* at 746-47. To resolve the critical issue of whether Southern Liquid Gas was a utility, the Court analyzed the then-statutory definition of public utility, which was identical to the present definition in Ala. Code § 37-4-1(7). From its statutory analysis, the Court found: “an essential element of a utility is that it is both serving and is constituted to serve all inhabitants in the area who comply with reasonable conditions.” *Southern Liquid Gas Co.*, 44 So. 2d at 747. Applying that finding to the case at bar, the Court held:

there is nothing to show that [Southern Liquid Gas] was organized as a utility or acting as such. The mere fact that it is ‘a gas distributing company, distributing artificial gas by tanks, drums, cylinders or otherwise’ does not show that it must do so upon compliance by its customers with certain conditions.

Id. (citations omitted). Similarly, the mere fact that EVCS distributes converted electrical currents through specialized equipment to electric vehicle batteries does not show that EVCS must supply

such charging services to all the inhabitants in its area. In fact, EVCS is only setup to serve a select group of consumers who have invested in electric vehicles as opposed to all the inhabitants of an area. Further, those select consumers come from various regions of the state, country, and world. Those select consumers are limited even more depending on the brand of vehicle they own as not all EVCS are set up to service all forms of electric vehicle batteries that are on the market. Thus, EVCS are not required to serve all inhabitants of a certain geographical area who comply with certain conditions and are not providing service “to or for the public” as that phrase is used in Ala. Code § 37-4-1(7)(a).

Subsequently, the Supreme Court of Alabama expanded on its findings in *Southern Liquid Gas Co.* by stating that utilities have an actual “duty” to serve the public that is independent of statutes regulating the way the business is run. *Miller v. Hillview Waterworks Project, Inc.*, 139 So. 2d 337, 339-40 (Ala. 1962). According to the Court in *Miller v. Hillview*, “[t]he duty is imposed because [utilities] are organized to do a business affected with a public interest and are held out to the public as being willing to serve all of its members” *Id.* In that case, the Court determined that a water company was a business affected with a public interest and had a duty to serve all members of the public that comply with reasonable conditions. *Id.* Because of this determination, the water company was labeled a utility and subject to the Commission’s jurisdiction. Unlike the water company in *Miller v. Hillview* that provided the public with water (a commodity necessary to sustain life), EVCS is not a business affected with a public interest. Instead, EVCS is a business affected with a public convenience. EVCS have no implicit duty to serve all members of the public, rather they provide a convenience to consumers who have the luxury of owning an electric vehicle. Additionally, not every EVCS is set up to service all types

of electric vehicle batteries on the market. As a result, EVCS should not be classified as utilities nor subject to the jurisdiction of the Commission.

To better understand what it means to be a business affected with a public interest, the Supreme Court of Alabama turned to the plain meaning of the words “public utility” in *Coastal States Gas Transmission Co., Inc. v. Alabama Public Service Commission*, 524 So. 2d 357 (1988). At issue in *Coastal States* was the Commission’s requirement that a pipeline company (Coastal States) comply with utility regulations before selling natural gas to select industrial customers under private contract. *Id.* at 357. In holding that the Commission’s regulation of Coastal States as a public utility was unauthorized, the Court consulted Webster’s Dictionary and Black’s Law Dictionary. *Id.* at 360 (“When plain language is used in a statute, this Court is bound to interpret that language to mean exactly what it says.”). The Court revealed that,

Webster’s Dictionary (New Riverside ed. 1984) defines a ‘public utility’ as ‘a private business organization, subject to governmental regulation, that provides an essential commodity or service, as water, electricity, or communication, to the public.’ And, in *Black’s Law Dictionary*, (5th ed. 1979) at 1104, the term ‘public utility’ is defined as: ‘A privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent domain, in consideration of which the owner must serve all persons who apply, without discrimination. It is always a virtual monopoly.

Id. at 360. After considering these definitions, the Court determined that the services provided by Coastal States were not so essential as to place the company within the narrow scope of the term “utility.” The services provided by EVCS are like those provided by Coastal State in that they are offered to a select group of customers under private contract. In addition, the services provided by EVCS are not of such an essential nature that they must be provided to all persons without discrimination. Therefore, EVCS cannot be placed within the narrow definition of “utility” provided in Ala. Code § 37-4-1(7)(a).

EVCS are not businesses affected with public interest and do not serve all members of the public. Unlike gas, electric, sewer, or water providers EVCS do not engage in supplying the public necessary services and do not service all inhabitants within the area they operate. Instead, EVCS provide a convenient service of charging electric vehicle batteries to a limited number of consumers who have chosen to invest in an electric vehicle. Thus, EVCS do not provide service “to or for the public” as the Supreme Court of Alabama has interpreted that phrase.

- c. Are there any other situations or scenarios beyond those presented herein where the Commission has or would have regulatory jurisdiction over EVCS?

EVCS should be subject to marketing and advertising rules that apply to most retail businesses as well as to safety and environmental regulations. The Commission should challenge any deceptive practices under consumer protection statutes and regulations. Regulations specific to transactions at EVSC, however, should not be imposed without proof that free market forces and existing laws are not sufficiently protecting consumers.

As for safety and environmental regulations, the State of Alabama should use its police power and license EVCS subject to periodic safety inspections and environmental compliance. Along these lines, ensuring proper installation and use of charging equipment should remain a priority as the EVCS market expands.

- d. Should the deployment of publicly available electric vehicle charging stations be considered competitive market?

The lack of charging stations is a major barrier to the growth of the electric vehicle market. To overcome this barrier, utility policies need to encourage greater investments in charging infrastructure and other programs that expand electric vehicle adoption. This expansion must be done in a manner that supports the grid and results in some value to the owners of the electric vehicles. A step towards encouraging investment in electric vehicle charging station expansion is

to facilitate a competitive market for publicly available EVCS. The natural pressures of a competitive market will ensure that EVCS owners/operators provide quality service at a just and reasonable price to consumers without the rate regulations set forth in Section 37-1-80 of the Alabama Code.

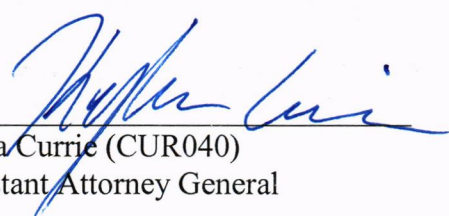
IV. Conclusion

The Attorney General appreciates the Commission's leadership in initiating this commenting period and hopes the Commission will adopt policies that foster the growth of the electric vehicle market. EVCS expansion will benefit the consumers of Alabama in relieving range anxiety and allow them to invest in these vehicles of the future.

Done on December 15, 2017.

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BY:



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